(9)

No. 87-746

In The

Supreme Court of the United States

October Term, 1987

MICHAEL H.,

Appellant,

and

VICTORIA D., a minor by and through her Guardian Ad Litem, Leslie Shear,

Appellant,

v.

GERALD D.,

Appellee.

On Appeal from the Supreme Court of California

BRIEF ON THE MERITS FOR APPELLEE GERALD D.

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QUESTION PRESENTED

Do the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution prohibit a state from enacting as part of its paternity law a statute which recognizes a husband as father of his wife's child and protects his relationship with the child against attack by a man who claims that the child was conceived as a result of his sexual liaison with the wife while she was living with her husband?

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PROCEEDINGS BELOW

On November 18, 1982, Michael H. commenced this proceeding in the Superior Court of the State of California for the County of Los Angeles for a declaration that he was the father of Victoria D., a minor who was then a year and half old, and relief, including orders that he have visitation with Victoria, dependent upon his claim of paternity. Named as defendants in the original complaint were only Victoria and her mother, Carole D.

In April, 1983, acting on its own motion, the trial court appointed a local attorney, who was a stranger to the parties, to represent the child. (R. 5.)[1] Upon her own petition, the court appointed attorney had herself appointed Victoria's guardian ad litem. (S.A. A-4) The attorney/guardian ad litem for Victoria has served in that dual capacity ever since, and she now appears before the Court pro se, as attorney for the guardian ad litem.

On April 11, 1983, Michael amended his complaint to add as a party Carole's husband, Gerald D., who had been married to Carole and living with her when Victoria was conceived and born. (J.A. 9)

The guardian ad litem filed a cross-complaint against Carole, Gerald, and Michael, alleging that Michael and Gerald both claimed to be Victoria's father, and seeking a determination of their competing claims and relief, including visitation and support orders, incident to that determination. (J.A. 14)

Although neither Michael's complaint, his first amended complaint, nor the guardian ad litem's cross-complaint were served upon him, Gerald appeared in the action on August 15, 1984. In his response to the pleadings of Michael and the guardian ad litem, Gerald denied Michael's claim of paternity and alleged that he, Gerald, was Victoria's father, and that Michael's claim was barred by provisions of California law, including Evidence Code Section 621. (J.A. 25, 27)

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1. The following notation is used throughout this brief: "R." means the record on appeal; "J.A." means the Joint Appendix; "J.S." means the Jurisdictional Statement; and "S.A." means the Supplemental Appendix to the Jurisdictional Statement.

On October 19, 1984, Gerald filed a motion for summary judgment as to Michael's first amended complaint and the guardian ad litem's cross-complaint; the motion was based upon Section 621 (R. 166). In opposition, Michael filed his own lengthy affidavit offering evidence relating to his claim that he, and not Gerald, had provided the sperm which resulted in Victoria's conception, and setting forth the times during which his relationship with Carole permitted him access to Victoria (R. 345; J.A. 73), and the guardian ad litem provided the report of the court appointed psychiatrist who had interviewed, observed, and tested the parties. (R. 321; J.A. 41)

On January 28, 1985, Gerald's motion was heard and granted, and the trial court subsequently entered its judgment declaring Gerald to be Victoria's father and dismissing Michael's complaint and the guardian ad litem's cross-complaint. (J.A. 86)

Michael and the guardian ad litem appealed to the California Court of Appeal, which affirmed the judgment (J.S. B1). A Petition for Review by the California Supreme Court was denied (S.A. A-100). In 1987, two years after the summary judgment motion was granted, Michael and the guardian ad litem sought orders awarding Michael visitation with Victoria pending determination of the appeals; following a two day hearing, the request was denied. (S.A. A-82)

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STATEMENT OF FACTS

After several months of living and traveling together, on May 9, 1976, Gerald and Carole were married. (J.A. 1 and 5) Gerald and Carole resided together as husband and wife in every common respect. During 1978 Carole became pregnant by Gerald, but that pregnancy terminated by a miscarriage. (J.A. 6) A year later, Carole again became pregnant by Gerald, but that pregnancy was terminated by a therapeutic abortion. (J.A. 6)

In September 1980, Carole became pregnant for the third time in the marriage. (J.A. 6, 36) Gerald prepared for the birth of his first child by regularly attending Lamaze classes with Carole. (J.A. 2, 6) Gerald was not able to use his Lamaze coaching skills in that the baby was born one month premature by Caesarean section. (J.A. 2, 6) Nevertheless, Gerald was in the delivery room of Cedars Sinai Hospital in Los Angeles on May 11, 1981, participating in the birth of his daughter, whom he and his wife named Victoria. The birth was complicated by a collapsed lung and for the first twenty-four hours of Victoria's life Gerald remained in the hospital with his wife until their daughter was out of danger. (J.A. 2, 6) Gerald took Victoria and his wife to their Los Angeles home from the hospital five days after the birth, and thereafter lovingly took care of both his wife and their newborn daughter. (J.A. 2, 6)

Gerald was the proudest of fathers: one month after Victoria's birth, Gerald's mother and father traveled from their home in France to meet and visit with their new granddaughter. Later that summer Gerald's brother also came from France to meet the family's newest family member. (J.A. 2, 6)

While Carole pursued other interests, Gerald remained the constant, lovingly responsible father to Victoria, and was, in fact, most oftentimes Victoria's sole caretaker. (J. A. 2, 6) In October, 1981, for business reasons, Gerald was required to move to New York City where he was employed as a United States representative of a French oil company. (J.A. 2) For reasons that Gerald did not understand, Carole insisted upon remaining in Los Angeles, and Gerald reluctantly agreed that she and Victoria could remain in their Los Angeles residence. (J.A. 2 and 7)

According to Michael, he and Gerald's wife, Carole, engaged in acts of sexual intercourse during the period that Carole conceived Victoria. After Victoria was born, Carole told Michael that she believed that the child could be his. (J.A. 77) After Gerald moved to New York City, Carole, Michael and Victoria had blood tests performed at the University of California at Los Angeles. Those tests showed that there was a 98.07% probability that Michael H. is Victoria's biological father. (J.A. 77) Thereafter, Carole and Victoria lived with Michael in St. Thomas for two months, from January, 1982 to March, 1982. (J.A. 28)

After leaving Michael, Carole and Victoria resided with Gerald in New York for one month in the spring of 1982, and for another month during the summer of 1982, during which time Victoria was baptized at a ceremony attended by all of Gerald's family. (J.A. 36, 39) In the fall of that year, 1982, Gerald, Carole, and Victoria spent three weeks together in Europe, at which time Gerald and Carole agreed that they and Victoria would reside together in New York.

After the European vacation, Carole returned to Los Angeles with Victoria to make arrangements to move back to New York with Gerald, but was served with this action, filed by Michael on November 18, 1982. (J.A. 7, 78)[2] As a consequence of the lawsuit, Carole's plans to return with Victoria to New York were postponed, but on March 11, 1983, Carole and Victoria did return to New York where they resided with Gerald through June 1983. (J.A. 3, 7)

In July, 1983, Carole and Victoria returned to Los Angeles. During the period August, 1983 through April, 1984, Carole permitted Michael to stay with her and Victoria when he was in Los Angeles. Michael resided in St. Thomas during November, 1983, and most of December, 1983. He spent Christmas that year in Los Angeles with Carole and Victoria (J.A. 78-79), but he returned to St. Thomas on January 23, 1984, and did not return to Los Angeles until March 23, 1984. (J.A. 80)

During these intermittent periods in which Michael resided with Carole and Victoria, between August, 1983, and April, 1984, Michael's behavior was noticeably peculiar: he would lock himself in a room alone, sometimes for days at a time, refusing to come out; he would either be indifferent to Victoria, or tease her by telling her such things as "there are monsters in your bedroom at night." (J.A. 18) When Michael returned from St. Thomas at the end of March, 1984, Carole told him that she did not want him to stay in the apartment with her and Victoria. (J.A. 19) Michael refused to leave, and became more physically abusive toward Carole. (J.A. 19) On April 25, 1984, Carole

2. As of November, 1982, when Michael filed his complaint for paternity, he had spent only two months with the then 16-month old Victoria.

entered a closed bedroom in the apartment and discovered Michael sitting on the bed with Victoria. Michael's legs were stretched out, and on one leg he had placed several rocks in a line from his knees to his groin. Victoria was picking up the rocks one by one in a direction leading toward the groin. Carole also discovered photographs of Victoria in the nude taken by Michael. (J.A. 19-20)

Michael's "peculiar" behavior in Carole's apartment during the early part of 1984 is consistent with the court-appointed psychiatrist's subsequent psychological findings that Michael "exhibits virtually all of the characteristics associated with parents who engage in incestuous-type relationships." (J.A. 46) In his evaluation report, which was premised on the recommendation that Michael be recognized as the legal parent of Victoria, (J.A. 69) Dr. Stone recommended that Michael's interaction with Victoria be strictly limited and that he not be assigned major caretaking responsibilities, even to the extent of a "standard" visitation schedule, because of the potential harm to Victoria: "moreover, a completely blind analysis of projective tests by a third-party, Dr. Stephen J. Howard, raised questions regarding the *risk* of a sexual relationship between [Michael] and [Victoria]; in all areas [Dr. Howard's] analysis was entirely consistent with the independent interpretation of data by [Dr. Stone]." (emphasis in original) (J.A. 63-64)

On the other hand, Dr. Stone found Gerald to be a kind and intelligent man who has a real attachment to both

Carole and Victoria and who clearly demonstrates the capacity to be a fine parent. (J.A. 45)

Immediately after the rock incident, Carole and Victoria left Michael in the Los Angeles apartment, and did not return until after obtaining restraining orders to keep Michael at least 50 yards away from the apartment and Victoria's school. (R. 70-80) Within a month by the first of June, 1984, Carole had reconciled with Gerald and since that date, the family unit of Gerald, Carole and Victoria has happily maintained and grown together. (J.A. 37, 40)[3]

THE STATE STATUTE INVOLVED

California Code of Civil Procedure Section 1962(5), the predecessor of Evidence Code Section 621, was enacted in 1872, when California's laws were first codified. That version of the statute provided, "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." Apart from a

3. Appellants and Amici have grossly exaggerated the extent of Michael's relationship with Victoria. Michael resided with Carole and Victoria only a total of 7 months spread out intermittently over the first 35 months of Victoria's life. Thereafter, but for a Saturday and Sunday in November, 1984, in the office of a psychologist, and an additional Saturday and Sunday in mid-1984, and a Saturday and Sunday during the second week of January, 1985, Michael has had no contact with the now 7 year old Victoria. (J.A. ~~A-~~88.)

1975 amendment, adding the requirement that the husband not be sterile as a condition for application of the statute, the only substantive legislative changes in the law since 1872 consist of amendments enacted in 1980 and 1981 authorizing husbands and wives, respectively, to rebut the presumption under limited, specified circumstances. (Stats 1980, ch. 1310 Section 1 and Stats 1981, ch. 1180 Section 1)

Although the statute, by its terms, purports to deny any person (except the mother and husband under the 1980 and 1981 amendments) the opportunity to rebut the presumption, the California courts, having considerable experience with the law as applied in a wide variety of circumstances,[4] have refused to interpret it literally. As construed, Evidence Code Section 621 creates a presumption, that a husband is father of his wife's children, which arises upon proof of the preliminary facts (marriage, cohabitation, and physical possibility of conception by the

4. The statute has been invoked by the mother to defeat her husband's attempt to avoid his support obligations, *In re the Marriage of B.* (1981) 124 Cal.App.3d 524, 177 Cal.Rptr. 429, *Keaton v. Keaton* (1970) 7 Cal.App.3d 524, 88 Cal.Rptr. 562; by a man other than the husband to avoid support obligations in proceedings initiated by the mother, *Hess v. Whitsett* (1968) 257 Cal.App.2d 552, 65 Cal.Rptr. 45, or the child, *Ferguson v. Ferguson* (1981) 126 Cal.App.3d 744, 179 Cal.Rptr. 108, *S.D.W. v. Holden* (1969) 275 Cal.App.2d 313, 80 Cal.Rptr. 269; by the husband to defend his claim of paternity against the claims of a man purporting to be the child's natural father, *Michelle W. v. Ronald W.* (1985) 39 C3d 354, 703 P.2d 88, app. dism. sub. nom. *Michelle W. v. Riley* (1986) 474 US 1043, *Vincent B. v. Joan R.* (1981) 126 Cal.App.3d 619, 179 Cal.Rptr. 9, app. dism. (1982) 459 U.S. 807; and by the heirs of the putative father to defeat the child's claim to their inheritance, *Estate of Cornelious* (1983) 35 C3d 461, 674 P.2d 245, app. dism. (1984) 466 U.S. 967.

husband) and which may be rebutted as provided in the statute or by any party whose interest in establishing the facts of the child's biological paternity outweighs the competing state and private interests in presuming the husband to be the father. *In re Lisa R.* (1975) 13 C3d 636, 648, 119 Cal.Rptr. 475, cert den. (1975) 423 U.S. 885, rehg. den. (1975) 423 U.S. 885, *Vincent B. v. Joan R.* (1981) 126 Cal.App.3d 619, 623, app. dism. (1982) 459 U.S. 807, *Estate of Cornelious* (1983) 35 C3d 461, 467, 674 P.2d 245, app. dism. (1984) 466 U.S. 967, *Michelle W. v. Ronald W.* (1985) 39 C3d 354, 364, 703 P.2d 88, app. dism. sub. nom. *Michelle W. v. Riley* (1986) 474 U.S. 807.

The treatment accorded the statute by the California courts underscores the significance of the policies it promotes. In all but one case, upon determining that the mother and husband were married to one another and cohabiting at the time of conception, and that the husband was not then impotent or sterile, the trial court summarily entered judgment in favor of the party who invoked the statute, and the appellate court affirmed, even where the matrimonial family had been dissolved by divorce (*Michelle W., Vincent B. v. Joan R.*) or by death of the husband (*Estate of Cornelious*), and regardless of whether the attack upon the integrity of the family came from without (*Vincent B., Michelle W.*) or within (*Estate of Cornelious, Michelle W.*). The one exception was *In re Lisa R.*, where the California Supreme Court reversed a judgment based upon application of an indisputable presumption of paternity; that case arose out of juvenile court proceedings concerning a child whose mother and presumed father both were dead. Thus, as interpreted and applied by the California courts, Section 621 implements a policy which so values the traditional family that the state's interest in protecting it outweighs any competing interest whenever the state's interest is implicated.

SUMMARY OF ARGUMENT

Although expressed in the terms of an irrebutable evidentiary presumption, California Evidence Code Section 621 is not a rule of evidence; nor is it irrebutable. Rather it is a substantive rule of law which recognizes a husband as father of his wife's child; that rule is applicable only in those circumstances where the state's interests in recognizing the husband as father are not outweighed by competing interests in according the rights of paternity to another man. Thus, as construed by California courts, Section 621 does not infringe upon rights protected by the due process clause.

Evidence Code Section 621 does not discriminate against unwed biological fathers, but, in fact, treats the rights of the unwed biological father the same as the rights of the bi ogical married mother. Furthermore, since the statute is not an irrebutable presumption, and does permit the offer of evidence as to whether the governmental objectives would be achieved, in some cases the biological father or child may rebut the presumption, and in other cases they may not, and thus does not violate the Equal Protection Clause.

ARGUMENT

I.

THE DUE PROCESS CLAUSE DOES NOT REQUIRE THAT STATE PATERNITY LAWS TAKE INTO ACCOUNT THE FACTS OF BIOLOGICAL PATERNITY OR THE BEST INTERESTS OF THE CHILD.

A.

Introduction

This Court has recognized that an unwed father has the right to a relationship with his child that, at least in some circumstances, may not be terminated by the state except in conformance with due process and equal protection requirements. *Stanley v. Illinois* (1972) 405 U.S. 645, *Quilloin v. Walcott* (1978) 434 U.S. 246, *Caban v. Mohammed* (1979) 441 U.S. 380, and *Lehr v. Robertson* (1983) 463 U.S. 248. The Court has also recognized the appropriateness of the state's preference for the formal family. See *Trimble v. Gordon* (1977) 430 U.S. 762, 769, *Moore v. City of East Cleveland* (1977) 431 U.S. 494, 505, *Meyer v. Nebraska* (1923) 262 U.S. 390, *Pierce v. Society of Sisters* (1925) 268 U.S. 510. In the instant case, the Court is called upon to assess the constitutional adequacy of California's procedures for establishing paternity insofar as they favor the family when those principles collide.

Appellants contend that application of Section 621 to the facts of this case violated their rights to due process in that they were not afforded a hearing at which they would have proved Michael's claim of biological paternity and that Victoria's interests would better have been served if Michael, rather than Gerald, were recognized as her father.

Appellants do not fully develop their argument. Under the rule which has emerged from the Court's decisions in cases involving the rights of unwed fathers (*Stanley, Quilloin, Caban,* and *Lehr*), that more than a mere biological connection between man and child is required to support the claim of a cognizable interest in the relationship,[5] Appellants claim that their relationship qualifies for protection.[6] However, Michael fails to justify extension of the rule, formulated in cases involving undisputed paternity and unwed mothers, to this case in which paternity is disputed by the mother's husband who, by any measure, has developed a far more substantial relationship with the child than the putative father; and the guardian ad litem fails to establish that a child has a constitutional right to select between two competing claimants the one entitled to recognition as her father.

In addition, Appellants contend that the question of paternity turns on a consideration of the child's best interests. This is a remarkable deviation from the traditional approach, which considers that the question of the child's best interests lies beyond the question of paternity. Yet, they fail even to consider the implications: if the child's welfare is relevant, what justification is there for retaining biological paternity as a condition for standing

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5. Michael admits that the naked claim of biological paternity does not give rise to an interest cognizable under the Constitution. "Of course, in those cases where the person who claims paternal rights has not established such a relationship with the child, he is without a constitutionally protected interest," (Brief for Michael H., 23, n.19.)

6. Clearly, Michael has made greater efforts and had more success in establishing a father-child relationship than did the Messrs. Quilloin and Lehr. However, his relationship with Victoria pales by comparison with the relationships involved in *Caban* and *Stanley*.

to compete with Gerald for recognition as Victoria's father? What is the standard by which the trial court would have determined the question, whether recognizing Michael or Gerald as Victoria's father would better promote Victoria's welfare? Who would have had the burden of proof, and by what quantum of evidence?

Appellants are unable to articulate their position fully because their arguments rest upon a fundamental misconception of the issues adjudicated and interests implicated in this proceeding. This was an action to determine *parentage;* Appellants' requests for orders allowing Michael *visitation* with Victoria were predicated upon their claims that Michael was entitled to recognition as Victoria's father.[7] Appellants were not afforded a hearing to establish the facts of Victoria's conception because, under Section 621, those facts are not relevant to the question whether Michael was entitled to recognition as Victoria's father; Appellants were not afforded a hearing to show that visitation with Michael would be in Victoria's best interests because, having determined that Gerald is

7. At the hearing on the motion for summary judgment, counsel for Michael contended that Michael could be awarded visitation even if Gerald were adjudged Victoria's father. The court replied that Michael had failed to assert that claim in his pleadings, and invited Michael to file an independent action (R. 485); Michael has declined the invitation. The statement of the guardian ad litem, that Victoria's pleadings sought visitation "independent of the determination of her paternity" (Guardian ad Litem's Brief on the Merits, 29) is simply not true; her cross-complaint sought a declaration of paternity and relief, including visitation and support orders, incident to that determination. In any event, the question presented in this appeal does not include the question whether the Constitution requires state laws to allow visitation to a non-parent over the parents' objections.

Victoria's father, the court never reached the question of Michael's right to visitation.[8]

B.

Due Process Analysis

Where application of a statute is challenged on due process grounds, the analysis begins with a determination whether due process requirements apply; that is, whether "the interest at stake . . . is within the Fourteenth Amendment's protection of liberty and property," *Board of Regents v. Roth* (1972) 408 U.S. 564, 571. If a protected interest is implicated, the state's interest must be identified, *Cafeteria Workers v. McElroy* (1961) 367 U.S. 886, 895, and the focus shifts from the nature to the comparative weight of the competing interests in determining the form of the hearing required before the state may act, *Goldberg v. Kelly* (1970) 397 U.S. 254, 263, and whether the means selected by the state to promote its interest "has a real and substantial relation to the object sought to be attained", *Nebbia v. New York* (1934) 291 U.S. 502, 525.

1. Michael's Interests

Michael claims that his interest in a relationship with Victoria is entitled to protection under the rule which emerges from the Court's decisions in *Stanley, Quilloin,*

8. The confusion between the question of paternity and the question of visitation is most apparent in the amicus brief of the ACLU which contains the succinct, but incorrect, statement, "[Michael] does [not] seek to displace Gerald as a father to Victoria. What Michael has sought is the right to continue a relationship with Victoria through court awarded visitation rights. . . ." (Brief Amici Curiae of American Civil Liberties Union Foundation, 6).

and *Lehr,* which involved unwed fathers whose claims of paternity were undisputed and children whose mothers, too, were unwed. Michael's reliance on those cases is misplaced.

The interest of the unwed father implicated in *Stanley, Quilloin,* and *Lehr* was not merely the preservation of an existing or potential *relationship* between man and child, it was the preservation of an existing or potential *familial* relationship. In each case, the Court emphasized that the protection afforded the biological father's interest in his offspring derives from the fact that the Constitution protects family integrity, *Stanley,* 405 U.S., at 651, *Quilloin,* 434 U.S., at 255, *Lehr,* 463 U.S., at 248; but the implicit assumption in those cases, that a "family" consists of mother, biological father, and child, is what is at issue here.

Moreover, the statutes involved in the unwed father's rights cases (the presumption of unfitness in *Stanley,* and the rules concerning step-parent adoptions in *Quilloin* and *Lehr*) all were designed by the state to promote the welfare of children, and the validity of the statute could be measured by how well or poorly it served that state's interest as applied in each particular case. Thus, in *Stanley,* the ostensible purpose of the law which required removal of children from the home of their father was to protect the children, but it applied in all cases with equal force, whether or not it served that purpose. And the step-parent adoption laws in *Quilloin* and *Lehr* were designed to permit adoption by step-parents in just those cases where adoption would serve the children's interests, and the question was whether the statutes involved adequately

protected the biological father's right to advance notice of the adoption proceeding and an opportunity to be heard with respect to the question of the best interests of his chi.d.

The validity of paternity laws, on the other hand, cannot be measured by how well or poorly they promote the interests of the children affected because the state does not purport to determine paternity in any particular case on the basis of the child's best interests. That the question of the child's welfare lies beyond the question of paternity is illustrated by the decision of the California Supreme Court *In re Lisa R.,* supra, 13 C3d 636. That case arose out of juvenile court proceedings involving a child whose mother and presumed father were dead. A man purporting to be the child's biological father sought to intervene, but was confronted with a statute similar to Evidence Code Section 621 in that it purported to deny putative fathers the opportunity to rebut the presumption of the husband's paternity. The putative father had a history of psychiatric problems and child abuse, and the state argued that its interest in the child's welfare was sufficient to outweigh the putative father's interest in proving paternity. The Court responded that "the question of [the putative father's] fitness to care for Lisa has not yet been placed in issue. The narrow question before us is whether he can submit evidence tending to establish parentage," 13 C3d, at 641-642, 649, n.14.

Without question, the decision whether to recognize Michael or Gerald as Victoria's father had a substantial effect upon the custodial rights of the parties. For example, while a man recognized as father is entitled to visitation absent a showing that such visitation would be de-

termintal to the child's welfare, California law allows visitation to non-parents, if at all, in the discretion of the court.[9] However, the fact that the judgment recognizing Gerald as Victoria's father had a significant impact upon Michael's rights to a relationship with Victoria is no reason to reverse the judgment; had Michael been recognized as Victoria's father, the judgment would have had the same effect upon Gerald's rights to visitation and custody. The impact upon Gerald's and Michael's rights was a consequence of the decision as to paternity, and not a factor in reaching that decision.

The question raised by Michael's appeal is whether the Constitution requires the state to prefer the child's biological father over the matrimonial family into which she was born, even though the mother's husband willingly assumed and has fulfilled the role of father to the child and the family is in tact. At stake was not Michael's interest in a relationship with Victoria, but his distinct and narrower interest in establishing that he is, and that Gerald is not, Victoria's father. While the Constitution may require the states to provide a procedure for determining the identity of a child's father when his identity is unknown or disputed, it does not require the states to recognize as father the man who impregnated the child's mother.

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9. California Civil Code Section 4601 provides, "Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child".

2. Victoria's Interests

The guardian ad litem's arguments would be appropriate if addressed to a committee of the California legislature considering a proposed amendment or repeal of Section 621. Citing statistics and sociological treatises, she contends that the paradigm of the traditional family is an anachronism, and that application of Section 621 is more likely to harm than to benefit Victoria under the circumstances of this case. However, it is not the function of this Court to pass on the wisdom of state policy; rather, the question is whether the Constitution prohibits the state from following the course it has chosen. On that question, the guardian ad litem has nothing to add to Michael's arguments.

Her contention, that Victoria has an interest at stake which is distinct from and not dependent upon Michael's, to wit, the right to choose her father, is not supported by any of the authorities cited. *Stanley, Quilloin, Caban,* and *Lehr,* as well as *Santosky v. Kramer* (1982) 455 U.S. 74 and *Rivera v. Minnich* (1987) — U.S. —, 107 S.Ct. 3001 all speak of the rights of fathers, not children. The one case that does discuss the constitutional rights of children, *Belloti v. Baird* (1979) 443 U.S. 622, concerned a statute which required minors to obtain parental consent for an abortion, and this Court there recognized that the Constitution provides less protection to children than to adults.

Moreover, if Victoria were accorded the right to choose her father, the questions arise, "Who will make the

choice for the child?"[10] and "By what standard will that choice be made?"[11] In this case, the choice was made by the guardian ad litem, an attorney who has never met Victoria and whose knowledge of what is in her best interests is limited to what she read in a psychiatric report written in September, 1984.

The psychiatrist, who assumed that the marriage of Carole and Gerald was doomed (J.A. 47) and that Michael would be adjudged Victoria's father (J.A. 68), had found Gerald to be intelligent, sensitive, direct, open, insightful, objective, witty and poignant, that he experienced a real attachment to Victoria (J.A. 56), and that "regardless of Victoria's biologically (sic) heritage [Gerald] experienced himself as her father for the first year of her life and thus no 'facts' can erase that feeling presently," (J.A. 58). Michael, on the other hand, was found to possess "strong unmet needs for affection and dependency and underlying feelings of inadequacy fused with strong aggressive drive," (J.A. 59) and to exhibit "virtually all of the characteristics associated with parents who engage in incestuous-type relationships" (J.A. 43). The psychiatrist

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10. While the guardian ad litem does not address this question, the amicus brief in her support bluntly states that the child should have the right to rebut the presumption "when deemed appropriate by the guardian ad litem" (Brief of Amicus Curiae of National Council For Children's Rights, 11).

11. Obviously, the child's welfare would be the guiding principle. However, there are many factors which affect the child's best interests. In this case, the guardian ad litem has focused upon preservation of a relationship. She might as well have favored Michael over Gerald on the basis of a comparison of their wealth, religion, ethnic or national origin, or theories of child rearing.

recommended that Michael's "interaction with Victoria be strictly limited," (J.A. 50).

How such a report might induce a conscientious guardian ad litem zealously to pursue a relationship for Michael with Victoria is not the question for decision in this proceeding; the question is whether the Constitution requires that the state entrust such decisions as choosing a child's father to an attorney appointed for the child who might act as Victoria's guardian ad litem did in this case.[12]

It is not disputed that a child has an important interest in assuring that some man is recognized as her father; the child's rights to support and to inherit, for example, depend upon such a determination being made. However, in a case where there are two men competing for recognition as the child's father, the child has no cognizable interest in participating in the process by which the choice between them is made; from the child's perspective, a rule which recognizes as her father her mother's huband works just as well as a rule which recognizes the man whose sperm resulted in her conception. Even if the child's best interests were a factor in determining paternity there is no reason to afford the child an opportunity to participate in the proceedings through her court

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12. That report was also the sole basis for the guardian ad litem's efforts to win visitation for Michael with Victoria during the pendency of the trial court proceedings and, in 1987, when Victoria was twice as old as she had been when the report was written and more than two years after she had any contact with Michael, pending determination of the appeals. Indeed, the guardian ad litem concludes her brief with the request that *this* Court rely upon that report and award Michael visitation.

appointed guardian ad litem, who would be vested with the discretion to determine which man to favor, and the basis upon which to make that determination.[13]

3. The State's Interests

Appellants misconstrue the state's interests served by Section 621. They portray the statute as a means for conserving judicial resources by conclusively presuming to be true, and thereby avoiding litigation of, the factual statements that the husband is the biological father, that the biological father is unfit unless he was married to the mother, and that application of the statute is necessary and sufficient to maintain the stability of the mother's marriage. They insist that such a statute violates their procedural due process rights to prove false that which the state presumes to be true, and that their respective interests in a relationship with each other are more than substantial enough to outweigh the state's meager interest in judicial economy. For this argument, they rely upon *Vlandis v. Kline* (1973) 412 U.S. 441 and *Stanley v. Illinois,* (1972) 405 U.S. 645.

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13. That is not to say that a gu .rdian ad litem serves no useful purpose in an action such as this. She can assure that the question of paternity is resolved by the court after a hearing on the merits and without collusion among the adults. Thus, it was quite appropriate for the guardian ad litem to file her cross-complaint; in doing so, she precluded dismissal of the action or judgment by stipulation without her consent. Unfortunately, that is not how this guardian ad litem perceived her role; during the early stages of the case, before Gerald had appeared, Carole and Michael agreed that Michael would be adjudged Victoria's father, but the guardian ad litem did not object or insist that Gerald first be consulted; the only reason this case was not resolved by that stipulation was Carole's change of mind.

However, the presumption of Section 621 is not conclusive; as interpreted by the California courts, it may be rebutted by whomever has an interest in doing so more substantial than the competing interests served by application of the presumption. Thus, Section 621 is distinguishable from the statutes involved in *Vlandis* and *Stanley*, which allowed rebuttal of the presumptions there involved by no one, under any circumstance.

Moreover, the state does not purport to establish by presumption any facts relating to biological paternity, the fitness or unfitness of the biological father, or the stability of the mother's marriage. Rather, in cases where the statute applies, California considers the fact of biological paternity and (as in paternity cases not governed by Section 621, where biological paternity is dispositive) the fitness of the man identified as the father, to be irrelevant. While the state does have an interest in preserving matrimonial families, one that is well served by application of the statute in this case, the cases in which the statute was applied even after dissolution of the mother's marriage, such as *Vincent B. v. Joan R.* and *Michelle W. v. Ronald W.*, demonstrate that the statute must serve some other purpose than maintaining the stability of the mother's marriage.[14]

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14. Appellants trivialize the state's interest in according respect to the matrimonial family by characterizing as an interest in preventing divorce, and they challenge Section 621 on the grounds that they were denied the opportunity to establish by discovery and at a hearing that application of Section 621 was neither necessary nor sufficient to save the marriage of Carole and Gerald. Thus, Michael complains that his right to due process included the right to a hearing which would focus on the stability of the marriage of Carole and Gerald (Brief for Michael H.,

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The most significant state's interests implemented by application of Evidence Code Section 621 under circumstances of this case are the policies of (1) promoting marriage; (2) maintaining the relationship that has developed between the child and presumed father; and (3) protecting and preserving the integrity and privacy of the matrimonial family *Estate of Cornelious, Kusior v. Silver* (1960) 54 C2d 603, 354 P.2d 657.[15]

The fact that the marriage of Carole and Gerald has managed to withstand Michael's claim and the enormous financial and emotional pressures imposed by this proceeding, and that fact that their marital family has florished and grown, attests to the fact that application of the statute has served its purposes of encouraging marriage and protecting Gerald's relationship with Victoria.[16]

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23), and the guardian ad litem states that recognizing Michael as Victoria's father and allowing him visitation "would have little or no effect on the marriage of Carole and Gerald" but, if it did, she would attribute any problems in the marriage to its fragility and not to Michael's periodic intrusions (Guardian Ad Litem's Brief on the Merits, 21). Ironically, the state's interest in protecting the marital family would be frustrated by subjecting it to just this sort of scrutiny by legal strangers.

15. Other state interests underlying Section 621 have been identified, including assurance of support for children, protecting children from the stigma of illegitimacy and from traumatic changes in family structure, and fostering stability of titles and inheritances, *Estate of Cornelious,* supra, 35 C3d, at 465.

16. Michael and the guardian ad litem choose to ignore the state's interest in protecting Gerald's parent-child relationship with Victoria, one which developed from September, 1980, when Victoria was conceived, until May, 1982, on Victoria's first birthday, when Gerald first learned of Michael's paternity

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With respect to the state's interest in the integrity of the matrimonial family, two of its important aspects are implicated under the circumstance of this case.

The first pertains to family privacy. During the trial proceedings, Carole and Gerald were deposed by the guardian ad litem and by Michael's counsel. Michael attended the deposition. A number of questions were asked which Carole and Gerald refused to answer upon the advice of counsel, who relied on Section 621. (Deposition of Gerald, R. 234-290, Deposition of Carole, R. 291-320) The deposition transcripts, the motions, and the responses to the motions amply demonstrate how well Section 621 serves to protect the privacy of a husband and wife subjected to this sort of a proceeding. But for Section 621, Gerald and Carole would have been required to testify, in the presence of Michael, about matters such as their sexual habits and practices with each other and outside their marriage, their finances, and their thoughts, beliefs, and opinions concerning their relationship with each other and with Victoria.

The second aspect of this state's interest in the integrity of the family which is implicated in this case is the state's interest in limiting its own intrusion into the family whenever possible and expressing a preference for the formal family. In a society which does not entrust to the

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claim, and one which has continued to grow notwithstanding these proceedings. Indeed, it is astounding that Appellants purport to present a fair statement of the facts of this case by a summary hardly mentioning Gerald and saying nothing at all of his relationship with Victoria.

state the primary responsibility for rearing children, the rules employed to identify a child's parents have profound moral, emotional, economic, and legal consequences: the state recognizes one mother and one father for each child, and confers upon them, and only them, parental rights and duties of enormous scope, such as the right to name the child, to custody, to decide where the child will live, to impose discipline, and to make decisions about the child's education, medical treatment, and religious upbringing. For the same reasons the rearing of children is deemed beyond the province of the state, so is formulation of subjective standards by which the state will impose its judgment as to who is, and who is not, qualified to assume parental responsibilities.

The rule which recognizes the mother's husband as her child's father avoids unwarranted state regulation of family constituency, and reflects the importance of marriage "in developing the decentralized structure of our democratic society", *Lehr v. Robertson,* supra, 463 U.S. 248, 257. In the case of a marital family, the legal attachments between husband and wife and the respect accorded by the state to the formal family, create an environment in which the state's recognition of parental rights and its preference for the family reinforce each other: by insulating the family from state and private intrusion, the state frees parents to pursue their presumed natural inclination to act jointly in the best interests of their children.

4. Weighing of Interests

In recent years this Court has dismissed appeals in three cases from California in which the appellants claimed denial of due process by application of Evidence Code

Section 621. *Vincent B. v. Joan R.* (1981) 126 Cal. App.3d 619, 179 Cal. Rptr. 9, app. dism. (1982) 459 U.S. 807; *Estate of Cornelious* (1983) 35 Cal.3d 461, 674 P.2d 245, app. dism. (1984) 466 U.S. 967; *Michelle W. v. Ronald W.* (1985) 39 Cal. 3d 354, 703 P.2d 88, app. dism. (1986) 474 U.S. 1043. In these cases, the private interests of the appellants were far more significant than those presented herein by Michael or the guardian ad litem, and yet, the California courts found that the application of the statute was not violative of due process. The order of this Court dismissing the appeal in each of those three cases "constitutes a disposition of the case on its merits and carries the effect of *stare decisis.*" *Hicks v. Miranda* (1975) 422 U.S. 332, 344.

In *Vincent B.*, Joan R. and Frank R. were married in May 1961. They remained married and cohabitated as husband and wife until separation and divorce in 1974. A boy was born to the marriage on May 11, 1970, and lived with Joan and Frank until the separation, when Joan was awarded custody of the child. In May, 1977, Vincent B. filed a paternity action wherein he alleged that he was the father of the child, with whom he had been visiting regularly, approximately three times per week, since the child's birth. In that case the trial court granted summary judgment and the Court of Appeal affirmed, holding "Appellant's interest in the instant case is not as great, nor entitled to as much constitutional consideration, as the interests of the putative father's in *Stanley* [*Stanley v. Illinois, supra,* 404 U.S. 645] and *Lisa R.* [*In re Lisa R., supra,* 13 Cal. 3d 636]."

By contrast, in the instant case, Gerald and Carole have not divorced, but rather continue to live together as husband and wife, happily nuturing a growing family of which Victoria is the oldest child. Additionally, unlike Vincent's seven year continuous relationship with the child, Michael's relationship with Victoria has been limited to only seven months spread out intermittently over the first thirty-five months of seven year old Victoria's life.

In the *Estate of Cornelious,* a child claiming to be the daughter of the deceased introduced blood-test evidence showing that both she and the deceased had the sickle-cell anemia trait and that her mother's husband (her presumed father) did not have that trait. The probate court applied Evidence Code Section 621 and held that the deceased was not the child's father. The California Supreme Court affirmed, holding that substantial State interests outweigh the child's private interests in the decedent's estate.

In the instant case, Victoria's family is very much alive and well, and the state's interest of preserving the integrity of the family weighs much heavier than in *Cornelious* where the child's presumed father had died and her mother favored the court action.

In *Michelle W.*, Judith W. gave birth to a child who was conceived during her marriage of Ronald W. while she was having an affair with Donald. Judith and Ronald separated four years after the child's birth and when they divorced, Judith was awarded custody and Ronald was granted visitation. Thereafter, Donald and Judith married. Since that marriage, the child lived in Donald's home and he held her out to be his natural child. Subsequently,

Donald and the child, aged six, through her guardian ad litem, brought an action to establish paternity. The trial court granted summary judgment pursuant to Evidence Code Section 621 in favor of the husband and against the putative father and the child. The California Supreme Court affirmed, concluding that the state's interest in "familial stability" outweighed Donald's and the child's interest in proving Donald's claim of parentage, even though Donald had established a new matrimonial family with the child and her mother, *Michelle W. v. Ronald W.,* supra, 39 Cal.3d, at 362.

Clearly, Michael H.'s interest in establishing paternity is not as weighty as the interest of the putative fathers in *Vincent B.* and *Michele W.,* and Victoria's interest, if any, is not as weighty as the child's interest in *Cornelious.* On the other hand, given the continued family in the instant case, the state's interest in maintaining the integrity of the family weighs even heavier than it did in *Vincent B., Cornelious,* and *Michelle W.* Thus, the application of Section 621 to the instant case comports with the requirements of due process of law.

II.

THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THAT STATE PATERNITY LAWS TREAT ALL MEN AND WOMEN ALIKE.

The Appellants argue that California Evidence Code Section 621 constitutes an impermissible gender-based discrimination between biological mothers and putative fathers in two respects: (1) Section 621 allows the biological mother of the child to rebut the presumption that her hus-

band is the child's father, but the putative father is not allowed to rebut the presumption; and, (2) Section 621 allows a biological mother to remain a parent, but a putative father is precluded from asserting his parental rights.

Subsection (d) of Section 621 states: "The notice of motion for blood tests under subsection (b) may be raised by the mother of the child not later than two years from the date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child." Thus, the plain language of the statute indicates that the rights of the natural married mother and natural unwed father are conditioned upon each other. Section 621 is distinguishable from the statute invalidated by this Court in *Caban v. Mohammed*. The statutory scheme that violated equal protection in *Caban* was such that only unwed mothers, and not unwed fathers, received hearings prior to a termination of child custody. Section 621, on the other hand, does not give the natural married mother any greater rights than it gives the natural unwed father.

Gender-based distinctions, "must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand judicial scrutiny under the Equal Protection Clause. *Craig v. Boren* (1976) 423 U.S. 190, 197, *Reed v. Reed* (1971) 404 U.S. 71. In our due process analysis, we have articulated a number of reasons justifying recognition of the mother as a parent and Section 621's objective of protecting the integrity of the family into which the child is born. Contrary to Appellants' assertion, the objective of Section 621, to maintain the biological mother as a

parent, in all instances, while precluding a putative father from asserting his parentage if the child was conceived during marriage and the mother and her husband resist the putative father's challenge, bears a substantial relationship to the state's interest of assuring parentage for the child and protecting the family into which the child is born. If we were to accept Appellants' logic, and make Section 621 gender-neutral, since putative fathers cannot be forced to assert their parental rights, Section 621 would have to allow biological mothers to similarly walk away from their parental obligations, leaving a child with no parents!

Appellants are simply incorrect in arguing that the objective of Section 621 in maintaining the integrity of the family into which the child is born is defeated because the statute "precludes any hearing which challenges the husband's paternity . . ." (Brief for Michael H., page 29.) In our due process analysis we emphasize the fact that Section 621 is not an irrebutable presumption, and does permit the offer of evidence as to whether the governmental objective of maintaining the family unit would be achieved in the respective case. *In re Lisa R.* Unlike *Lisa R.*, in which the mother and presumed father were dead and thus there was no state objective to be maintained, Appellants herein are not able to rebut the presumptions under the facts of this case in which Gerald and Carole have remained married and are raising a growing family, of which Victoria is a part, but this does not mean that all putative fathers and all children are barred in all cases.

Thus, even though Appellants may not like how Section 621 is applied in this case, that California statute does not violate the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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